UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MEYER TOOL, INC.

and **Case 09–CA–185410**

WILLIAM CANNON-EL, III

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for the General Counsel
Ryan M. Martin and Daniel Rosenthal, Esqs.
for the Respondent
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for the Charging Party

DECISION

I. INTRODUCTION

ANDREW S. GOLLIN, ADMINISTRATIVE LAW JUDGE. This case was tried before me on April 10-11, 2017, in Cincinnati, Ohio. The complaint alleges that Meyer Tool, Inc. (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (Act) when it summoned the police to remove, indefinitely suspended, and later discharged William Cannon-El, III, because he and other employees made complaints, orally and in writing, related to Respondent's creation of a new "go-to-guy" position, the individual selected for the position, and management's reactions to their concerns about the alleged need for this new position. Respondent denies the alleged violations, contending that Cannon-El was not engaged in protected, concerted activity, and that the actions taken against him were because he engaged in intentionally intimidating and threatening behavior and repeatedly refused to leave Respondent's premises when so directed.

Based upon the evidence and applicable law, I find that Cannon-El was engaged in protected, concerted activity, and that Respondent took the actions at issue against him because of that activity. I further find that, under the circumstances, Cannon-El's statements and conduct, including his failure to immediately leave when so directed, did not cause him to lose the protection of the Act. As a result, I find that Respondent violated the Act as alleged in the complaint.[1]

II. STATEMENT OF THE CASE

On September 29, 2016, Cannon-El filed an unfair labor practice charge against Respondent, which was docketed as Case 09-CA-185410. He filed a first-amended unfair labor practice charge against Respondent on October 7, 2016, and a second-amended charge on November 18, 2016. Based on its investigation, on January 31, 2017, the Regional Director for

[1] Abbreviations in this decision are as follows: "Tr.___" for transcript; "G.C. Exh.__" for General Counsel's Exhibit; "R. Exh. __" for Respondent's Exhibit; "G.C Br,____" for General Counsel's brief; and "R. Br. ___" for Respondent's brief.

Region 9 of the National Labor Relations Board (Board) issued a complaint, alleging that Respondent violated Sections 8(a)(1) of the Act when it called the police, suspended, and later discharged Cannon-El because he engaged in protected, concerted activity. On February 14, 2017, Respondent filed its answer, denying all alleged violations of the Act.

At the hearing, all parties were afforded the right to call, examine, and cross-examine witnesses, present any relevant documentary evidence, and argue their respective legal positions orally.[2] Respondent and General Counsel both filed post-hearing briefs, which I have carefully considered. Accordingly, based upon the entire record, including the post-hearing briefs and my observations of the credibility of the witnesses, I make the following

III. FINDINGS OF FACT[3]

JURISDICTION

At all material times, Respondent has been a corporation with an office and place of business in Cincinnati, Ohio, and has been engaged in the manufacture of components for aerospace and industrial gas turbine engines. In conducting its operations during the 12-month period ending December 1, 2016, Respondent has performed services valued in excess of $50,000 for customers outside the State of Ohio. Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Based on the foregoing, I find this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

IV. UNFAIR LABOR PRACTICES[4]

BACKGROUND

Cannon-El worked for Respondent at its Cincinnati, Ohio manufacturing facility from September 4, 2007 to June 8, 2016. At the time of his termination, Cannon-El was assigned to the New Product Introduction (NDI) department, where he worked the night shift (approximately

[2] The General Counsel filed a post-hearing motion to correct the record to: (1) include the second page of G.C. Exh. 2, which had been inadvertently omitted from the record; and (2) remove pages 1 and 2 from the four-page copy of G.C. Exh. 8, as those first two pages (which were from a different document) were withdrawn and not received into the record, causing the remaining pages of G.C. Exh. 8 to be renumbered as pages 1 and 2, respectively. Respondent also filed a post-hearing motion to correct the transcript to replace the word "shouldn't" on page 407, line 18 with the word "should" because the word "should" is correct and consistent with the remainder of the sentence. After reviewing the record, I grant both unopposed motions to make the necessary corrections.

[3] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case.

[4] The following factual summary is a compilation of the credible and uncontradicted testimony. To the extent that there was a dispute in testimony, I have assessed the witnesses' credibility considering a variety of factors, including the context of the witness' testimony, the witness' demeanor, corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions. Indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, supra.

5 p.m. to 4 a.m.). Chris Bauer and John Poff are two of the other employees who worked the night shift in the NDI department. Their direct supervisor was Rick Ackerson.

Prior to the events at issue, the NDI department experienced production-related issues, and a conflict arose between night-shift and day-shift employees regarding which shift was primarily responsible for causing the issues. Poff informed members of management that certain day-shift employees were making false accusations about night-shift employees, particularly Cannon-El, not performing their jobs properly. Poff and other employees presented management with reports showing that the accusations were untrue. At some point Respondent's vice president of operations, Gordy McGuire, appointed Huck Finn to be the plant manager to oversee the night shift. McGuire held a meeting where he instructed the night-shift employees to report to Finn. (Tr. 286-287).

MAY 25 MEETING

On May 25, 2016,[5] Rick Ackerson held a departmental meeting in the employee breakroom at the start of their shift. Cannon-El, Poff, and Bauer attended this meeting, along with night-shift employees Glenn Young, Steve Korb, and Mark Metcalf. Ackerson began the meeting by announcing that the company had created a new "go-to-guy" position for their area, and that Mark Metcalf was selected to fill the position.

Following the announcement, Ackerson opened it up to questions. Poff, Bauer, and Cannon-El each asked questions or raised concerns. Poff asked what the go-to-guy was supposed to do, what authority did he have, and to whom did he report. Specifically, Poff asked if the night shift was now supposed to report to Mark Metcalf, and not Huck Finn. Ackerson responded that was what he had planned, and that was how it was going to work. Ackerson then said, "If you don't like it, there is the door." (Tr. 272). Bauer and Cannon-El asked questions about Metcalf, his qualifications, and how he was selected for the position. Ackerson responded that Metcalf was qualified because he had 30 years of experience. Bauer stated that he would not listen to Metcalf, who Bauer considered to have less experience than he had, and Bauer did not think Metcalf knew the area well enough.

At some point during the discussion, Poff got up and walked out of the breakroom. The meeting continued. Bauer and Cannon-El asked Ackerson more questions. Cannon-El asked why their area needed a "babysitter." Ackerson responded it was because Cannon-El was not doing his work, and that he was never in his assigned area. Cannon-El asked for proof of that. Ackerson responded he did not have to prove anything.

Ackerson then telephoned Gordy McGuire to inform him about what was happening at the meeting. Ackerson reported to McGuire that Cannon-El and Bauer had stated that they were not going to listen to the go-to-guy. Cannon-El spoke up and said, 'Rick, you're lying on me, I never said that." Bauer then raised his hand and said, "Will didn't say that, I said that." Cannon-El then asked if McGuire could come to the meeting so they could all discuss the matter in person. Ackerson spoke with McGuire, hung up the phone, and stated that McGuire was on his way to the facility. Bauer got up and went back to work. Cannon-El and the other employees (Young, Korb, and Metcalf) remained in the breakroom waiting for McGuire to arrive.

[5] Hereinafter all dates refer to 2016, unless otherwise stated.

About 10 minutes later, McGuire arrived and headed to the breakroom. McGuire walked in and started yelling at Cannon-El, telling him, "Rick is your supervisor. He tells you what to do. I don't care who he appoints. You listen to him." Cannon-El responded that he never said that he was not going to listen to Metcalf, and that Ackerson was making false statements. By this point, McGuire was standing over Cannon-El, their faces inches apart. Cannon-El asked McGuire if he could back up and calm down. McGuire responded, "I don't have to calm down. Don't tell me what to do." Cannon-El leaned away to create some distance. (Tr. 40-41).[6] By this point, Poff had returned to the breakroom. (G.C. Exh. 8).

Ackerson then raised that the day shift outperformed the night shift by 4-to-1, and they had the data to prove it. When Cannon-El asked for proof, Ackerson refused, stating it was "none of their business." Cannon-El then brought up that management previously had made allegations against night-shift employees, which were later proven to be false, but nothing was done to correct the matter. (G.C. Exh. 8).

At some point, McGuire turned the topic to Cannon-El being away from his work area. He told Cannon-El they had him on video regularly being outside during his shift. Cannon-El again asked for proof. He explained to McGuire that there were times he would go outside because one of the machines they worked on was in a room with no ventilation, and there were times the air in the room would be so thick with coolant that he needed to step outside to get fresh air. Cannon-El asked, "I don't have the human right just to get some fresh air?" McGuire answered, "No. The State of Ohio said that the air [in the facility] is good enough for you to breath, so that's it." McGuire then said "you are just like everybody else." (Tr. 280).

Poff spoke up and asked McGuire if Huck Finn was the supervisor, or was he supposed to listen to Metcalf. McGuire responded that he was to listen to Finn. Poff said that was all he needed to know. Poff left the breakroom but remained out in the hallway and was able to overhear the rest of what was said. (Tr. 41; 276-280).

According to Poff, McGuire continued to "jump on" Cannon-El for the concerns he was raising. (G.C. Exh. 8). McGuire then told the employees to get back to work. (Tr. 42-43). As Cannon-El was leaving, McGuire stopped him and asked him, "Do you think it was smart of you and a good worker of you to disrespect your supervisor the way you did?" Cannon-El then looked to Ackerson and asked, "Rick, did you think anything that I did today was disrespectful?" Ackerson responded, "You did call me a liar." Cannon-El said, "Rick, you were lying on me." Cannon-El then asked McGuire, "Do you think it was professional of you to get in my face the way you did?" McGuire responded, "I did not get in your face." He then turned to Ackerson and said, "I did not get in his face." Ackerson then said to Cannon-El, "He did not get in your face." (Tr. 43-44). Cannon-El laughed this off and said, "Oh, I see you guys can work together just fine." (Tr. 284). Cannon-El then went back to work.[7]

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[6] After leaving the meeting, Poff went to human resources and spoke to Deanna Adams, who at the time was a human resources generalist. Poff informed Adams about his concern that his supervisor, Ackerson, was telling him to report to Mark Metcalf, not Huck Finn. Poff explained that he was concerned that he would get disciplined if he did not report to Finn. (Tr. 273-274). Adams called Gordy McGuire on the telephone to tell him what was happening. After Adams hung up, she informed Poff that McGuire was on his way to the meeting, and she suggested that Poff return there and talk directly to McGuire. Poff then left and returned to the employee breakroom. (Tr. 274).

[7] Poff, Bauer, and Cannon-El were the only witnesses who testified about this meeting. Neither Ackerson nor McGuire was called to testify. I draw an adverse inference against Respondent for failing to present

Later during the shift, Cannon-El, Bauer, and Poff spoke about the meeting. They discussed their issues, including the announced new go-to-guy position, the confusion over who they were to report to, and the way Ackerson and McGuire handled themselves during the meeting. They agreed that the next day before work they would go to human resources to file complaints about what happened. Poff commented to Cannon-El that the way McGuire spoke to him at the meeting was not right. (Tr. 287-288).

EVENTS OF MAY 26

The following day, Cannon-El arrived at Respondent's human resources department at around 4:30 p.m. He was the first of the three to arrive. The human resources department is located in a separate building, away from the production areas. It consists of several small offices on each side of a narrow hallway that is approximately 4 feet wide. There is a door on one end that goes outside, and a set of double doors on the other end that goes into the reception/lobby area of the building.

Cannon-El had been to human resources before to file complaints, including ones against Ackerson. However, the human resources employees he usually dealt with were not there, so he went to Tina Loveless' office. Loveless is a senior human resources assistant. Cannon-El told Loveless that he was involved in a situation the night before and wanted to file a complaint. She gave Cannon-El a piece of paper and told him to write his complaint out and return it. As she handed him the paper, Poff and Bauer arrived. Loveless assumed they were all together, so she also gave them paper and told them to write out their statements. (Tr. 517-518). Cannon-El, Poff, and Bauer then went in to the training room down the hall to write their complaints. They did not discuss or review each other's complaints before submitting them.

Bauer finished first and headed back to hand in his complaint. He saw Deanna Adams, a human resources generalist, in her office. Adams' office is approximately 6-by-9 feet, with a desk in the center of the room, with two chairs in front and one behind. Bauer took the chair farthest from the door, across the desk from Adams. Bauer told Adams about the meeting and his concerns about this new go-to-guy position. Bauer explained he did not know who he was supposed to listen to, Metcalf or Finn. The two discussed the matter, and Adams informed Bauer that if he did not trust Metcalf's decision making, then he should go to Finn because Finn was the boss.[8] At some point, Bauer gave Adams his written complaint.[9] (Tr. 178-179).

Ackerson or McGuire, both admitted statutory supervisors and agents, to provide testimony regarding the context and contents of this May 25 departmental meeting. See *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting an ALJ may draw an adverse inference from a failure to call a witness who may reasonably assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version, particularly when the witness is an agent).

[8] Bauer testified that Adams had addressed his concerns, but that he stayed in the room. When asked at hearing why he did not leave, Bauer responded, "I don't know. Because we were all together. I believe we came together, we were going to leave together." (Tr. 223-224).

[9] In his written complaint, Bauer described the meeting to announce the new "go-to-guy" position and Metcalf's selection to fill the position, and that he had stated he would not listen to someone that was not an official supervisor because he needed someone that was going to be held accountable for making work decisions. Bauer also commented that Ackerson's demeanor during the meeting was unprofessional, and that he was concerned that McGuire was not aware of all of the issues occurring in the department. In his complaint, Bauer asked certain questions, including whether he could be punished for refusing to listen to someone that was not his official boss; whether if the bosses compared employees to one another were they required to provide information/numbers to back up what they are

Poff finished his complaint a few minutes after Bauer.[10] He got up and headed to Loveless' office. Upon arriving there, Poff saw that Loveless was helping someone else. He then saw Bauer sitting and talking to Adams in her office. He went in and gave Adams his complaint. He stood behind the chair next to where Bauer was sitting, closest to the door, across from Adams. Poff began by telling Adams that every time employees try to report an issue, they are met with opposition. Then, he told Adams he believed the night-shift employees were being treated like second-class citizens. He said that the day-shift employees were making false accusations about second-shift employees, specifically Cannon-El, not getting their work done, and that the managers would then yell at the second-shift employees based on these false accusations. (Tr. 295-296). Poff told Adams he had pulled data from the company's computer system which proved that it was actually one of the day-shift employees who had made the false accusations against Cannon-El that was not getting his work done, and the data showed Cannon-El was, in fact, getting his work done. (Tr. 296).

Cannon-El finished his complaint a few minutes after Poff.[11] He went to turn it in to Loveless, but saw that she was with someone. He then saw Bauer and Poff with Adams in her office, with the door open. Cannon-El walked in and stood just inside the doorway to her office. Cannon-El asked Adams if he could ask her a question, and she said yes.[12] Cannon-El asked that if he was filing a complaint against the vice president of the company, who holds the vice president accountable. Adams asked what the complaint was about. Cannon-El stated that the vice president had physically assaulted him. Adams asked what happened. Cannon-El then explained, demonstrating on Poff of how McGuire was standing over him, in his face, yelling at him. Adams commented that was not physical assault. She said that if McGuire did not touch him, it was not physical assault. Poff spoke up and said it probably was not physical assault, unless McGuire spat on Cannon-El. But Poff added that what McGuire did probably was verbal assault. Adams then told Cannon-El that she was trying to help him by telling him the law. Cannon-El then smirked at Poff and told Adams he was not asking her about the law and that

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saying, or was that slander; and at what point does a boss step over the line verbally. Bauer added that he was concerned about retaliation for raising these questions. (G.C. Exh. 6).

[10] In his written complaint, Poff began by describing what occurred during the departmental meeting on May 25. The first paragraph tracked what he already had discussed with Adams the night before. Poff's complaint then described what he observed when he returned to the meeting in the breakroom. Specifically, he described how Ackerson and McGuire were berating Cannon-El for asking questions, and how they made false allegations about the night shift's work performance. Poff also noted that when Cannon-El asked them to provide evidence to support their allegations, McGuire and Ackerson both refused. Poff noted that Ackerson made a statement that the day shift outperformed the night shift 4-to-1, and that they had the data to prove it. When Cannon-El against asked to see it, McGuire and Ackerson said that it was none of their business. Poff described how Cannon-El had brought up past allegations that were proven to be false, and nothing was done to correct the public berating the night-shift employees received. Poff addressed his exchange with McGuire about who he should report to, Finn or Metcalf, and McGuire telling him to report to Finn. (G. C. Exh. 8).

[11] In his written complaint, Cannon-El described the May 25 departmental meeting. He described how Ackerson called McGuire during the meeting and falsely stated that Cannon-El had indicated that he was not going to listen to the new go-to-guy, and that Ackerson falsely alleged that Cannon-El was not doing his job, did bad work, and was never in his assigned area. Cannon-El noted that when he asked for these claims to be proven, he was attacked further. He also described how when McGuire arrived at the facility, he was rude, disrespectful, and highly unprofessional. Cannon-El described that when McGuire accused him of regularly being outside during his shift, Cannon-El explained that it was because of the air quality issues in his work area. To which, McGuire responded that the State of Ohio considered the air to be fine, and that he (Cannon-El) was just like everybody else. (G.C. Exh. 3).

[12] Prior to this, Adams and Cannon-El had never interacted with one another.

she was acting outside of her field by telling him the law. Cannon-El then corrected himself and said that McGuire had verbally assaulted or threatened him during the meeting, and he added he thought it was racially motivated. Adams asked him what McGuire said. Cannon-El told her about the exchange in which McGuire said that he (Cannon-El) "was just like everybody else." According to Cannon-El, Adams responded that "race had nothing to do with it, so just throw that out." Adams, on the other hand, testified that she told Cannon-El that she would not consider that a racial slur, noting that everyone else in Cannon-El's department was Caucasian.[13] The bottom line was Adams stated she did not think it was a racist comment.

Cannon-El and Adams continued to go back and forth briefly. As they did, their voices got louder. Adams began repeatedly saying "whatever" and motioning with her hands to move the conversation along.[14] Cannon-El smirked again and said, "You know what, I see we're not going anywhere. I'm going to add your name to my complaint because you're acting very unprofessional, and to me you're conspiring against me from filing my complaint." (Tr. 55). Cannon-El then stepped into Adams' office to use her cabinet to write her name and department on the bottom of his complaint. Adams then told Cannon-El to leave her office. He took a step back into the hallway but was still visible from inside the office. At some point during the exchange, and it is not clear when, Adams telephoned the receptionist to have her call the police, stating that she had an employee that would not leave her office. (Tr. 413-414). From the hallway near the door to Adams' office, Cannon-El asked Adams if he could leave his complaint with her, and Adams answered "no." She then told Cannon-El to clock out and go home. Cannon-El asked her "Why?" or "What did I do?" Adams told him that he was being very aggressive. Cannon-El denied being aggressive and stated that he just wanted to file his complaint. At some point, Adams walked toward Cannon-El and told him that if he did not leave, she was going to call the police. Adams then told Cannon-El that she was going to give him until the count of three to leave, or she was going to call the police. She then started to count. She began with "one" and Cannon-El finished with "two, three." Cannon-El then said, "I have done nothing wrong." (Tr. 362). Adams then walked passed Cannon-El to head toward the reception area to ask the receptionist contact the police (again).[15] The period of time

[13] From someone unfamiliar with Cannon-El, he would appear to be African-American. However, Cannon-El does not identify himself that way. He has gone through a process and now identifies himself as being of Asiatic race and Moorish-American nationality. (Tr. 137-138).

[14] Adams testified that after she said "whatever" to Cannon-El, he accused her and the human resources department of being racist, and that was when she told him to leave her office. Adams testified that Cannon-El was "loud" and that he was "waving his hands" and "was using them in the extreme." She testified she thought that Cannon-El was "trying to intimidate" her. (Tr. 408-409). Adams testified that after she told Cannon-El to leave her office, he became louder and angrier, and he accused her of unprofessionalism. (Tr. 409-410). At which point, she told him to clock out and go home because she was concerned that he was going to take his anger out on someone on the production floor. Cannon-El denied being loud, waiving his hands around, or trying to intimidate Adams. Poff and Bauer confirmed that Cannon-El and Adams both raised their voices during the exchange, but they never observed him waiving his hands around or acting in an intimidating or threatening manner. (Tr. 184-186; 191-192; 305-307). Overall, I credit Cannon-El, Poff and Bauer over Adams regarding Cannon-El's demeanor, tone, and actions during this exchange, as their versions largely corroborate one another and are more consistent with the overall evidence.

[15] Several witnesses testified that Rick Ackerson was standing in the hallway of the human resources department on May 26, while this exchange took place. As previously stated, Respondent did not call Ackerson to testify. Because of the dispute over what occurred, I have drawn an adverse inference against Respondent for failing to present Ackerson. See *Roosevelt Memorial Medical Center*, supra.

between when Loveless told Cannon-El to leave her office to when she left to go to the reception area was very short; it was estimated to be a couple of minutes. (Tr. 57; 244-246)

Cannon-El saw Loveless and asked if he could file his complaint with her. He also asked if she could make a copy for him to have.[16] Loveless took his complaint, made the copy, and gave it back to Cannon-El. Cannon-El remained in the hallway and called his sister on his cell phone to ask her to come to Respondent's facility, telling her that they had contacted the police when he tried to file his complaint and he wanted her there to be a witness when the police arrived. As he was doing this, Adams was coming back from the opposite direction, heading to her office. As she passed, Adams said, "If you would have let it go, none of this would have happened." She then informed Cannon-El that she had called the police. (Tr. 58).[17] Adams then headed back into her office. Cannon-El remained in the hallway while he talked to his sister on the phone, and then he left the human resources department through the double doors, and went and sat in the lobby entrance area.[18] As he sat there, he saw Adams go outside and stand with two other individuals to smoke. After seeing her outside, Cannon-El decided to remain seated in the lobby entrance area.[19]

According to the police report, the police were called at 5:16 p.m., and officers arrived at Respondent's facility at 5:30 p.m.[20] (R. Exh. 1). Cannon-El's sister arrived a minute or two

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[16] At some point, while Loveless was helping another employee in the training room, Cannon-El came in to gather his belongings that he left there while writing his complaint. He asked Loveless what Adams' last name was, and Loveless told him. Cannon-El stated, "Well, she'll pay for her actions." (Tr. 522). Cannon-El denied making this statement. However, I credit Loveless' testimony on this point. I find that Cannon-El was angry at how Adams had treated him when he tried to raise his complaints, and told her he was going to add her name to that complaint. When Cannon-El handed his complaint to Loveless it had Adams' last name at the bottom. A logical inference is he added it before he submitted it. (G.C. Exh. 3). However, I do not credit Loveless' testimony regarding the exchange between Cannon-El and Adams. She acknowledged she was not present and only overheard portions of what was said. (Tr. 534-535).

[17] Adams denies making this statement, but I do not credit her denial. Based on the context of their exchange, I believe Adams was frustrated with Cannon-El and his insistence that he had been assaulted by McGuire and that McGuire's statements were racially motivated. I find that she made this comment out of frustration about how things had transpired in her office.

[18] It is unclear how long Cannon-El remained in the hallway after Adams told him the police had been called, or how long he sat in the lobby entrance area waiting for his sister to arrive.

[19] At the hearing, Cannon-El testified that he remained at the facility because he was "fearful for [his] life" because he did not know what Adams had reported to the police. (Tr. 58). When asked why he waited in the lobby, Cannon-El testified because Adams was outside, and he "didn't want to go outside and make a scene, make this a bigger scene than it was." He testified that he figured if he sat peaceably, when the police arrived, they would see that he was not doing anything wrong. Cannon-El also stated he wanted to be present to hear what Adams said to police about him. (Tr. 66).

Poff testified he heard Cannon-El say to his sister on the phone that he wasn't leaving until the cops got there because he did nothing wrong and was just trying to file a complaint. (Tr. 362). Shireen Flick, a human resource employee, testified she overheard Cannon-El tell someone on the phone that he was going to remain there until the police arrived because he wanted it on record that the company called the police to escort him out. (Tr. 566-567). Based on the record evidence and logical inferences therefrom, I find Cannon-El remained at the facility because he did not want to be accused of fleeing the scene, and he wanted to show the police that he was acting peacefully and was doing nothing wrong. But I also find that he wanted to have it documented that Respondent called the police to have him removed after he attempted to file his complaint.

[20] It is unclear whether this 5:16 p.m. call to the police was from when Adams called from her office to have the receptionist contact the police, or from when Adams left her office to go to the receptionist area

before the police, and Cannon-El went outside to meet her. The officers spoke to Adams and Cannon-El, separately. Cannon-El used his cell phone to record the interaction. He provided the police with little information. Adams informed the police that Respondent wanted him to leave the premises. One of the officers asked her whether Cannon-El had been discharged, and Adams replied he had not. Thereafter, the police informed Cannon-El that Respondent wanted him to leave, and he left. No charges were filed.

EVENTS ON AROUND MAY 27

The following day, Cannon-El went to Respondent's facility to pick up his paycheck and to put in a request for leave. He attempted to gain access to the facility using the thumbprint scanning system, but it did not work. A night-shift supervisor met Cannon-El, gave him his paycheck, and told him that Respondent did not want him on its premises.[21]

Thereafter, Cannon-El called Loveless to inquire about his employment status. Loveless called him back with Nikki Fugate, a training instructor, also on the phone. Loveless and Fugate informed Cannon-El that they were conducting an investigation and they would let him know what happens after the investigation. Cannon-El did not work after May 26.

RESPONDENT'S INVESTIGATION AND DETERMINATION

Respondent later formed a three-member investigative committee, initially to look into the complaints Poff, Bauer, and Cannon-El filed regarding the May 25 departmental meeting, and later (after interviewing Adams) to also examine the events of May 26. The committee consisted of Fugate, Becky Schwartz (quality assurance manager), and Paul Rowland (manufacturing process director). The committee conducted their investigation from May 31 to June 6. During that time, the committee obtained written statements and/or conducted interviews of several witnesses, including Cannon-El, Poff, Bauer, Adams, Loveless, Ackerson, McGuire, and others. Cannon-El, Poff, and Bauer each addressed the contents of the May 25 meeting, the confusion surrounding the go-to-guy position, the conduct of Ackerson and McGuire during this meeting, and their decision to go to human resources the next day to file complaints. Each also discussed the issues the night-shift employees were having, and that the company seemed to do nothing about these issues. Each of them also provided the committee with their recollection of May 26, when they went to file their complaints.

After completing its investigation, including reviewing all the statements, the committee prepared written recommendations and submitted them to Respondent's owners. The committee made several recommendations, including: requiring mandatory group-oriented training for all of the NPI night-shift employees and Ackerson to help promote a team-oriented environment and open communications; and requiring individualized mandatory training for Ackerson (leadership development and communication with employees), Adams (employee relations), and McGuire (communication) "because their behaviors contributed to the escalation of both incidents." (R. Exh 8). Additionally, the committee recommended the next appropriate step of disciplinary action should be issued to Poff and Bauer in light of their refusal to comply with their supervisor's instructions and because they both were directly involved in creating "a

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to have her call the police. The police report reflects a second call from Respondent to the police, requesting an estimated time the police were going to arrive. (R. Exh. 1).

[21] At some point, Ackerson informed night-shift employees that he did not think Cannon-El would be coming back. (Tr. 344-345). It is unclear if Ackerson had information or was simply stating his opinion.

negative and argumentative environment" during the May 25 meeting. Finally, the committee recommended that Cannon-El be terminated, finding that his behavior was intentionally intimidating and threatening, and that he escalated the situation by repeatedly refusing to leave the premises when requested to do so. There is no explanation as to what the committee found Cannon-El to have done that was intentionally intimidating or threatening. Respondent's owners reviewed the investigative committee's findings (including their investigative notes and witness statements) and adopted their recommendations. On June 10, Respondent informed Cannon-El that he was being terminated for violating the company's workplace violence and other policies. (G.C. Exh. 5).[22]

LEGAL ANALYSIS

A. Overview

As previously stated, the General Counsel alleges that Respondent took the adverse actions at issue against Cannon-El because he engaged in protected, concerted activity when he, Poff, and Bauer made complaints, orally and in writing, related to Respondent's creation of the go-to-guy position, the individual selected for the position, and management's reaction when they raised concerns about the alleged need for this new position, in violation of Section 8(a)(1) of the Act.[23] Respondent denies the alleged violations, contending that Cannon-El was not engaged in protected, concerted activity, and that the actions taken against him were because he engaged in intentionally intimidating and threatening behavior and repeatedly refused to leave Respondent's premises when directed to do so. For the reasons stated below, I find that Cannon-El was engaged in protected, concerted activity, and Respondent knew of and took the actions at issue against Cannon-El because of that activity. I further find that, under the circumstances, Cannon-El's statements and conduct, including his failure to immediately leave Respondent's premises, did not cause him to lose the protection of the Act.

B. Cannon-El was engaged in protected, concerted activity on May 25 and 26

Cannon-El was engaged in statutorily protected activity during the events at issue. To be protected under Section 7 of the Act, the employee's conduct must be both "concerted" and for the purpose of "mutual aid or protection." *Fresh & Easy Neighborhood Market*, 361 NLRB

[22] On June 13, Respondent issued Poff and Bauer each an employee warning report (verbal warning) for improper conduct, lack of cooperation/teamwork, and insubordination. The reports each stated that they were "directly involved in creating a negative and argumentative environment during a [May 25] meeting." (G.C. Exhs. 7 and 10). After these disciplines were issued, both Poff and Bauer were, at different times, temporarily assigned to other departments. In her post-hearing brief, Counsel for General Counsel argues that these temporary reassignments were retaliatory or proof of discriminatory motive because Poff and Bauer engaged in protected, concerted activity on May 25 and 26. I note that there are no allegations in the complaint, and no motions to amend to include allegations, regarding these disciplines or temporary reassignments. Moreover, as for the temporary reassignments, the Counsel for General Counsel questioned Poff and Bauer regarding these reassignments, and each offered his opinion and the basis for his opinion for why they were temporarily reassigned. I find their observations and opinions are, without more, insufficient evidence to conclude that these reassignments were retaliatory or otherwise unlawful.

[23] Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

No. 12, slip op. at 3 (2014). The Board has held that activity is concerted if it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), revd. sub nom *Prill v. NLRB*, 755 F. 2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries (Meyers II),* 281 NLRB 882 (1986), affd. sub nom *Prill v. NLRB*, 835 F. 2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Concerted activity also includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action" and where an individual employee brings "truly group complaints to management's attention." *Meyers II*, 281 NLRB at 887. Furthermore, the Board has held it is concerted activity for an individual to raise a complaint that is a "logical outgrowth" of the concerns raised with the group. *Mike Yurosek & Son, Inc*., 306 NLRB 1037, 1038 (1992), after remand, 3 10 NLRB 831 (1993), enfd., 53 F.3d 261 (9th Cir. 1995).

The question of whether an employee has engaged in concerted activity is a factual one based on the totality of record evidence. *National Specialties Installations, Inc*., 344 NLRB 191, 196 (2005); and *Ewing v. NLRB*, 861 F.2d 353 (2d Cir. 1988). The Board had found that "ostensibly individual activity may in fact be concerted activity if it directly involves the furtherance of rights which inure to the benefits of fellow employees*." Anco Insulations, Inc.*, 247 NLRB 612 (1980). Conversely, concerted activity does not include activities of a purely personal nature that do not envision group action or seeking changes affecting the group. See *United Association of Journeymen and Apprentices of the Pipefitting Industry of the United States and Canada, Local 412*, 328 NLRB 1079 (1999); *Hospital of St. Raphael*, 273 NLRB 46, 47 (1984).

The "concertedness" and "mutual aid or protection" elements are analyzed under an objective standard, whereby motive for taking the action is irrelevant. *Fresh & Easy Neighborhood Market*, supra, slip op. at 3. The Board has noted that employees act in a concerted fashion for a variety of reasons, some altruistic and some selfish. Id. citing *Circle K Corp.*, 305 NLRB 932, 933 (1991), enfd. mem. 989 F.2d 498 (6th Cir. 1993). Whether an employee's activity is "concerted" depends on the manner in which his/her actions may be linked to those of his/her coworkers. *Fresh & Easy Neighborhood Market*, supra at 3.[24] The Supreme Court has observed that "[t]here is no indication that Congress intended to limit [Section 7] protections to situation in which an employee's activity and that of his fellow employees combine with one another in any particular way." Id. quoting *NLRB v. City Disposal Systems*, 465 U.S. 822, 831 (1984).

The concept of "mutual aid or protection" focuses on the *goal* of the concerted activity; whether the employee or employees involved are seeking to improve terms and conditions of employment or otherwise improve their lot as employees. *Fresh & Easy Neighborhood Market*, supra at 3 citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). The analysis focuses on whether there is a link between employee activity and matters concerning the workplace or employees' interests as employees. Id. Although personal vindication may be among the soliciting employee's goals, that does not mean that the soliciting employee failed to embrace the larger purpose of drawing management's attention to an issue for the benefit of all of his or her fellow employees. *St. Rose Dominican Hospitals*, 360 NLRB 1130, 1134 (2014).

[24] In *Fresh & Easy Neighborhood Market*, the Board found that an employee engaged in concerted activity when she approached coworkers to sign a copy of a reproduction of an offensive whiteboard message in support of her sexual harassment complaint, even though the coworkers were annoyed and uncomfortable with her request, and the employee was acting for selfish reasons.

During the May 25 departmental meeting, Cannon-El was engaged in protected, concerted activity in the classic sense when, in the presence of Poff, Bauer, and the other NDI employees, he raised questions and concerns about the newly announced go-to-guy position, the qualifications of the person selected to fill the position, and the reasons why management believed this new position was needed. See generally, *Modern Honolulu*, 361 NLRB No. 24 slip op. at 2, 13 (2014) (employee engaged in protected activity at mandatory meeting by raising questions about supervisors behavior); *Avery Leasing, Inc.*, 315 NLRB 576, 580 fn. 5 (1994) ("where an employee in the presence of other employees, complains to management concerning wages, or other terms and conditions of employment, such complaints constitute protected concerted activity"); and *Enterprise Products*, 264 NLRB 946 (1982) (employee remarks about an employer's plan related to wages, hours, and other terms and conditions of employment found protected and concerted). As for this last point, when Cannon-El asked why the night-shift needed a babysitter, Ackerson and McGuire accused the night shift generally, and Cannon-El specifically, of underperforming. Cannon-El disputed those accusations and asked for proof, which he was denied. Cannon-El pointed out that, in the past, he and other night-shift employees had disproven similar allegations, and management did nothing to acknowledge their error, and now management was again relying upon false accusations.

During this meeting, Ackerson and McGuire also accused Cannon-El of frequently being outside during his shift. Cannon-El responded that if he took breaks outside it was usually because he needed a break from the fumes caused by the machines in his area. The Board has held that an employee who raises safety issues affecting employees is engaged in protected, concerted activity. *St. Bernard Hospital & Health Care Center*, 360 NLRB 53, 61 (2013). See also *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962); and *Daniel Construction Co.*, 277 NLRB 795 (1985). Moreover, Poff testified that prior to this May 25 meeting, he had raised similar issues with Ackerson about the air quality and need for converters for the machines. Therefore, I find that Cannon-El's statements were a continuation of the concerns Poff raised earlier.

On May 26, Cannon-El continued to engage in protected, concerted activity when he, Poff, and Bauer went to human resources together to file complaints about what happened during the meeting, as well as how management treated the night-shift employees. Respondent contends that Cannon-El was not engaged in concerted activity because his concerns were separate and distinct from the concerns Poff and Bauer raised. Respondent claims Poff and Bauer spoke to Adams because they did not know who they were supposed to report to after Ackerson announced the new go-to-guy position, and that Adams spoke with each of them and satisfactorily addressed their concerns. Respondent argues it was thereafter that Cannon-El came into Adams' office wanting to file a complaint alleging that he had been assaulted by McGuire, and that McGuire had made a racially offensive comment by telling Cannon-El that he "was just like everybody else." Respondent asserts that Cannon-El's sole interest was in pursuing these personal concerns.

The Board has held that employees need not present the same issues or concerns in order for the conduct to be concerted. See *Mast Advertising & Publishing, Inc.*, 304 NLRB 819 (1991) (two employees who went to human resources together, with one primarily there as a witness, regarding concerns related to terms and conditions of employment were engaged in protected, concerted activity). Concertedness "is not dependent on a shared objective or on the agreement of one's coworkers with what is proposed." *Fresh & Easy Neighborhood Market*, supra at slip op. 3. An employee "may act partly from selfish motivations and still be engaged in concerted activity, even if [the employee] is the only immediate beneficiary of the solicitation." Id. Furthermore, the Board has held that ""[w]here an employee's objectives in taking certain

action may be mixed, and one supports a finding of concertedness, [the Board] may not ignore it in favor of one that does not." Id. As a result, Poff and Bauer did not have to agree with Cannon-El or join his cause in order for his activity to be concerted, nor did they have to share an interest in the matters he raised for the activity to be concerted.

That being said, I find they did share an interest in the matters Cannon-El raised with Adams. Cannon-El, Poff, and Bauer went to human resources with concerns over how management was communicating with employees, whether it was the information being shared or how it was communicated. Adams was already aware of some of the issues because of her conversation with Poff the night before, and she also was aware that McGuire was coming back to the facility to talk to employees about these issues. When Bauer spoke with Adams on May 26, it was clear that he shared the same concerns that Poff had raised the night before. But when Poff spoke with Adams again on May 26, in the presence of Bauer, he provided her more information and context. He explained how, in his opinion, the night-shift employees were being singled out with this go-to-guy position, and that management was treating them like second-class citizens. He also informed her that the day-shift employees were making false accusations that certain second-shift employees, like Cannon-El, were not getting their work done, and that management was relying on that false information to berate the second-shift employees. Poff also told Adams that it seemed like every time the night-shift employees tried to report an issue, they were met with opposition. It was at this point that Cannon-El came in and told Adams that he wanted to file a complaint against McGuire for his conduct the night before. When Cannon-El explained to Adams what McGuire had said and done, Cannon-El demonstrated on Poff, claiming it was physical assault. Poff opined that it may not have been physical assault, but that McGuire had verbally assaulted Cannon-El. Cannon-El then brought up how he believed that McGuire was racially biased based on what he had said. Although Poff had brought up how he believed management was biased based on what shift employees worked, and Cannon-El believed that management was racially biased, I find that they both, within a matter of a few minutes, informed human resources of at least perceived biases on the part of management.[25] All of which, I find, is more than sufficient to constitute protected, concerted activity.

Moreover, even if, as Respondent argues, Cannon-El was filing an individual complaint on May 26 about how he personally was treated during the May 25 meeting, I find that such a complaint constitutes concerted activity because it is the "logical outgrowth" of the concerns he and others raised during the meeting the night before. *Consumers Power Co.*, 282 NLRB 130, 131-132 (1986) (finding that even if employee had acted alone, his individual complaint would have been concerted because it was a continuation of his and his coworkers' earlier concerted

[25] Respondent argues that Adams was not aware of any protected, concerted activity because she did not read the written complaints that Cannon-El, Bauer, or Poff submitted, and she was not on the investigative committee that recommended the adverse actions against Cannon-El. I find that, regardless of whether she read the complaints, Adams was aware of Cannon-El's protected, concerted activity based on what was said in her office on May 26. Moreover, even if Adams was somehow in the dark, I find that Respondent's investigative committee was not. Nikki Fugate testified that the committee had written and oral statements from all of the individuals involved, including from Poff, Bauer, and Cannon-El, which covered their collective concerns related to the need for the go-to-guy position, the air quality issues, and management's overall treatment of the night-shift employees, particularly Cannon-El. The committee had this information at the time it made its recommendation (which was ultimately followed) to suspend and later discharge Cannon-El. In light of the foregoing, I find the investigative committee had all the information regarding Cannon-El's protected, concerted activity at the time it made its recommendations.

complaints raised at the employer's weekly meetings); and *JMC Transport*, 272 NLRB 545 fn. 2 (1984), enfd. 776 F.2d 612 (6th Cir. 1985) (finding an employee's pay protest concerted because it was "a continuation of protected concerted activity" involving a meeting wherein two employees jointly complained to management about wage payments). The complaint Cannon-El wanted to file with Adams, and later filed with Loveless, arose from how he was treated by Ackerson and McGuire after he raised collective concerns affecting the employees' terms and conditions of employment (e.g., the role and duties of the go-to-guy position, false accusations against the night shift, the air quality concerns, etc.).

In light of the overall circumstances, I find that Cannon-El was engaged in protected, concerted activity prior to and during his interaction with Adams on May 26. Respondent certainly was aware of Cannon-El's protected, concerted activity by the end of its investigation, and that activity is what led Respondent to take the adverse employment actions at issue.

C. Cannon-El did not lose the protection of the Act

There is no dispute Respondent took the actions at issue because of Cannon-El's statements and conduct on May 26. When an employee is disciplined or discharged for conduct that is part of the *res gestae* of protected, concerted activity, the question is whether the conduct is sufficiently egregious or opprobrious to remove it from the protection of the Act.[26] *Stanford Hotel*, 344 NLFB 344, 358 (2005). The Board recognizes that employees are permitted some leeway for impulsive behavior when engaged in protected activity, because the "protections Section 7 afford would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses." *Consumer Power Co*., 282 NLRB 130, 132 (1986). But this leeway is balanced against "an employer's right to maintain order and respect." *Piper Realty*, 313 NLRB 1289, 1290 (1994). To determine whether an employee loses the Act's protection, the Board balances the following four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices. *Atlantic Steel Co.*, 245 NLRB 814 (1979). In assessing whether the employee's conduct removed the protections of the Act, the asserted impropriety "cannot be considered in a vacuum" nor "separated from what led up to it." *NLRB v. Thor Power Tool, Co.*, 351 F.2d 584, 586 (7th Cir. 1965); *Emarco, Inc.*, 284 NLRB 832, 834 (1987).

The first *Atlantic Steel* factor looks to the place of the discussion. In evaluating the place of the discussion, the Board considers the circumstances, such as whether it occurred in the work area or during work time, was observed by other employees or customers, caused a

[26] The legal framework generally used to evaluate whether an adverse employment action violates Section 8(a)(1) of the Act is set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must make an initial showing that the employee's protected activity was a substantial or motivating factor for the employer's adverse employment decision, which requires: (1) the employee engaged in protected concerted activity; (2) the employer had knowledge of that activity, and (3) the employer had animus towards the protected activity. If the General Counsel makes the required initial showing, then the burden shifts to the employer to prove that it would have taken the same action in the absence of the employee's protected activity. However, the *Wright Line* framework is not applied where, as here, there is no dispute that the employer took the adverse action in response to conduct that occurred while the employee was engaged in protected activity. *Phoenix Transit System*, 337 NLRB 510, 510 (2002), enfd. 63 Fed. Appx. 524 (D.C. Cir. 2003).

disruption in the employer's operations, and/or undermined workplace discipline. See generally, *Kiewit Power Constructors Co.*, 355 NLRB 708 (2010)(favored protection where employer determined the location by distributing warnings in a work area during work time, and in front of other employees); *Datwyler Rubber & Plastics, Inc.*, 350 NLRB 669, 670 (2007) (favored protection where discussion took place away from customary work area); *Noble Metal Processing, Inc.,* 346 NLRB 795, 800 (2006) (favored protection where outburst occurred during meeting held away from work area causing no disruption to the work process); *DaimlerChrysler Corp.*, 344 NLRB 1324, 1329 (2005)(did not favor protection where disruption occurred in a work area and was overheard by other employees); and *Beverly Health & Rehabilitation Services*, 346 NLRB at 1322, n. 20, 1323 (favored protection when confrontation was not overheard by patients or non-employees).

The exchange at issue occurred in Respondent's human resources department, which is in a separate building, away from production areas. Like most employers, Respondent expects its employees to go to human resources with workplace questions or concerns. Human resources often deals with disputes over wages, hours, and working conditions, and, as previously stated, these disputes are among the most likely to engender ill feelings and strong responses, including expressions of fear, anger, or frustration. For these reasons, I find that, akin to grievance meetings, a human resources department is a forum in which employees should be afforded greater latitude to express their views. See *Mast Advertising & Publishing, Inc.*, supra at 819 (two employees going to human resources at a non-union company about a complaint tantamount to filing a grievance); *Stanford Hotel*, supra; *Winston-Salem Journal*, 341 NLRB 124, 126 (2004); *Spann Maintenance Co*., 289 NLRB 915, 920 (1988); and *Crown Central Petroleum Corp*., 177 NLRB 322 (1969), enfd. 430 F.2d 724 (5th Cir. 1970).

Although Cannon-El's conduct had no effect on production, it did occur in the presence of other human resources employees who heard loud voices and saw Cannon-El in the hallway on his phone. One of these other employees later reported to Respondent that it caused her to feel unsafe. But all of these other employees continued working, with their doors open. Based on the overall evidence, I find the location of the discussion was reasonable under the circumstances and favors continued protection, even though it was overheard by other human resource employees.[27]

I find that the second *Atlantic Steel* factor--the subject matter of the discussion—also favors protection. As previously stated, Cannon-El was in engaged in protected, concerted activity when he went with Poff and Bauer to file complaints about what happened the night before. The exchange began when Cannon-El asked Adams a question related to the complaint he wanted to file about the treatment he received from Ackerson and McGuire when he raised collective concerns during the meeting. The exchange that followed revolved around how the treatment that he received should be perceived, and what could or would be done about it.[28] In light of the foregoing, I find that the nature and purpose of Cannon-El's discussion with Adams, with both Poff and Bauer present, favors protection. *Datwyler Rubber & Plastics*,

[27] While the location of Cannon-El's comments and behavior toward Adams--an admitted supervisor--could be viewed as undermining her authority and workplace discipline, I find, and will discuss more fully herein, that Adams was at least equally as responsible for the escalation of their exchange by her statements and conduct when Cannon-El attempted to explain the basis for his complaints.

[28] In his written complaint, Bauer also asked "at what point does a boss step over the line verbally?" (G.C. Exh. 6). He, Poff, and Cannon-El each told the investigative committee about their concerns with how McGuire and Ackerson responded when employees asked questions or raised concerns.

350 NLRB at 630 (outburst of employee occurred during discussion of employee complaints about terms and conditions of employment, and weighs in favor of protection).

I find the third *Atlantic Steel* factor--the nature of the outburst—favors protection. In assessing whether an employee's protected, concerted activity loses the protection of the Act, the Board has held that a line "is drawn between cases where employees engaged in concerted activities that exceed the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives and those flagrant cases in which the misconduct is so violent or of such a character as to render the employee unfit for further service." *Prescott Industrial Products Co.*, 205 NLRB 51, 51–52 (1973). The nature of the outburst must be examined in the context in which it occurred. *NLRB v. Thor Power Tool, Co.*, supra. The Board uses an objective standard, rather than a subjective standard, to determine whether the conduct in question is threatening. *Plaza Auto Center, Inc.*, 360 NLRB 972, 975 (2014).

Respondent contends that Cannon-El engaged in intentionally intimidating and threatening behavior during this exchange, but it failed to articulate specifically what constituted such behavior.[29] I find that Cannon-El did not use profanity, engage in any physically intimidating conduct, or make any threats of physical harm.[30] He did, however, act defiantly when he finished Adams' count to three when she threatened to call the police if he did not leave, and when he briefly remained in the hallway after she instructed him to leave.[31]

[29] According to Nikki Fugate, there were two individuals who reported feeling threatened by Mr. Cannon-El's statements and conduct: Adams and Shireen Flick. (Tr. 617-618). Flick testified that she never heard what Adams or Cannon-El said during their exchange, only that she heard loud voices in the hallway, Flick also testified to hearing Cannon-El tell someone (his sister) on the phone that he was going to wait until the police arrived so that he could have it documented that the company called the police to escort him out. Respondent relied upon these two employees' subjective opinions about feeling unsafe to take the actions it did against Cannon-El. However, Loveless was asked if she felt threatened or unsafe by Cannon-El's conduct, and she said she did not. Poff and Bauer also informed Respondent that they did not feel as though Cannon-El engaged in any threatening conduct or conduct that warranted discipline. Applying an objective standard, I conclude based on the entire chain of events that Cannon-El did not engage in intentionally intimidating and threatening behavior.

[30] Respondent contends that Cannon-El threatened physical harm when he told Loveless that Adams would "pay for her actions." Again, based on the context in which it was said, I do not interpret this statement as a threat of physical harm. Cannon-El told Adams during their exchange that based on her responses to his questions he was going to add her name to his complaint because he thought that she was conspiring to keep him from filing his complaint. Thereafter, Cannon-El went into the training room to retrieve his belongings, and he saw Loveless and asked her what Adams' last name was. After Loveless told him Adams' last name, he said, "Well, she'll pay for her actions." He did not say anything else. At some point, Cannon-El wrote Adams' first and last name onto his complaint. Under these circumstances, I do not find that Cannon-El was threatening Adams with physical harm, but rather he was threatening to include her in his complaint. [At some point, Cannon-El filed a separate lawsuit alleging discrimination. There are references to the lawsuit, and the deposition he provided, in the record.] Without more, I do not find that this vague statement constituted a threat sufficient to cause Cannon-El to lose the protection of the Act. See *Kiewit Power Corp*., 355 NLRB 708, 710 (2012) (telling supervisors that the situation could "get ugly" and that supervisor "better bring his boxing gloves" did not lose the protection of the Act).

[31] Respondent contends that Cannon-El raised his voice during the exchange. However, Poff and Bauer confirmed that both Cannon-El and Adams raised their voices during the exchange. Regardless, the Board has held that merely speaking loudly or raising one's voice in the course of protected activity generally does forfeit of the Act's protection. *Crowne Plaza LaGuardia*, 357 NLRB 1097, 1101 (2011).

In evaluating the nature of an employee's outburst or misconduct, the Board considers whether it was the result of employer provocation. *Plaza Auto Center, Inc.*, supra at 979. I find Cannon-El's conduct at issue was in direct response to Adams' seemingly dismissive reaction to his complaints, her demands that he leave, and her threats to call the police if he did not.[32] Both Poff and Bauer confirmed that Cannon-El's demeanor was calm at the outset. It only changed after Adams began saying "whatever" when he tried to explain himself and press forward with his complaint. The situation further escalated when, in rather rapid succession, she demanded that Cannon-El leave her office, told him to clock out and leave for the day, and threatened to call the police if he did not leave. It was at this point that Cannon-El, acting out of frustration and disbelief, finished Adams' count to three and remained briefly in the hallway to ask Adams if he could file his complaint, what had he done wrong, and why he had to leave.[33] I find that Cannon-El would not have engaged in this conduct--which ultimately resulted in the adverse actions at issue--but for Adams' provocation, particularly her threats to involve the police. Moreover, I note that there is no evidence that Cannon-El had ever engaged in any even remotely similar conduct during his employment, and there is no evidence that his conduct was premeditated. See id. See also *Felix Industries, Inc.*, 339 NLRB at 196-197 (absence of prior similar misconduct coupled with timing of outburst supports that outburst would not have occurred but for supervisor's expression of hostility towards employee's protected conduct).

Respondent contends that the adverse employment actions were taken because Cannon-El was being insubordinate. The Board distinguishes between true insubordination and behavior that is only disrespectful, rude, and defiant. *Goya Foods, Inc.*, 356 NLRB 476, 478 (2011), citing *Severance Tool Industries*, 301 NLRB 1166, 1170 (1991), enfd. mem 953 F.2d 1384 (6th Cir. 1992). In *Goya Foods*, an employee was present for a heated discussion among employees and union agents in the employee cafeteria. A supervisor nearby overheard loud voices and told the employee to leave the cafeteria. The employee refused. The supervisor loudly repeated his instruction to leave the area, to which the employee loudly replied (in Spanish) to "come and take me out." The supervisor then directed the employee to punch out and go home. The employee initially either sat down or said he would sit down, but he eventually got up and left. The Board found that while the employee engaged in disrespectful, rude, and defiant behavior, it was not the sort of insubordination that lost the Act's protection. Id.

Similarly, in *Postal Service*, 360 NLRB 677 (2014), the Board found that a union steward did not lose the protection of the Act when during a confrontation with a supervisor he defied repeated instructions to leave the area. The steward wanted to file a grievance and he requested union time to do so. The supervisor asked for more information about the grievance, and the steward refused, stating that he was not obligated to provide any more information. The supervisor asked if he was trying to say that she did not know the contract, and the steward replied he did not think that she did. A confrontation ensued, and the supervisor told the steward to leave the area. The steward refused. The supervisor repeated, at least once, that she was giving him a direct order, and the steward repeated his response. The steward then moved in closer, said that he was not going to follow the supervisor's order, and pointed his finger at her. The supervisor then got up from her desk and said that she was calling the police,

[32] Respondent ultimately found that Adams was partially responsible for escalating the incident and recommended that she be required to receive individual training on employee relations. (R. Exh. 8).

[33] Respondent contends that the exchange escalated after Cannon-El accused Adams, the human resources department, and the company as a whole of being racist. While such an accusation is serious, it is not so inflammatory as to lose the protection of the Act. See *Winston-Salem Journal*, 341 NLRB 124, 126 (2004), enf. denied 394 F.3d 207 (4th Cir. 2005).

which she did. The steward then returned to his work station. The police arrived, and the steward was later discharged. The Board, in adopting the administrative law judge's findings, concluded that the nature of the steward's outburst, including his defiant refusal to leave the area, did not cause him to lose the protection of the Act. In that case, the judge found that, under the circumstances, the supervisor's calling the police "was wholly unjustified and a gross over-reaction to their argument." Id. at 684.[34]

Overall, I find that while Cannon-El was engaged in disrespectful, rude, and defiant behavior when he finished Adams' count to three and when he briefly remained after being told to leave, he was not engaged in the sort of misconduct that is so violent or of such a character as to render him unfit for further service. As previously stated, the employee's conduct must be examined in the context in which it occurred. *NLRB v. Thor Power Tool, Co.*, supra. I find that because Adams provoked Cannon-El's response, and the amount of time between when Adams first told Cannon-El to leave her office and when she went to the reception area to have the police called was a matter of a few minutes, the circumstances do not support finding that Cannon-El lost the protection of the Act.

Respondent argues that I also should consider the time Cannon-El remained in the hallway and lobby reception area after Adams informed him that she contacted the police, as further evidence of insubordination. I decline to do so. By the time Adams informed Cannon-El that the police were on their way, he had basically ceased interacting with anyone in the human resources area. He called his sister to request that she come down to be his witness when the police arrived, and then he went and sat down in the lobby reception area. As Cannon-El testified, once he knew the police were on their way, he remained at the facility because he did not want to be accused of fleeing the scene, and he wanted the police to see that he was acting peacefully and not doing anything wrong. He also testified that he waited in the lobby rather than go outside because he saw Adams outside smoking a cigarette, and he did not want to have a "bigger scene." All of which I find to be reasonable under the circumstances. Similar to *Postal Service*, supra, I find that but for Adams' overreaction to the questions and concerns raised in her office, the police would not have been called. But once Cannon-El knew the police had been called, and without knowledge as to what Adams had reported to them, it was prudent for Cannon-El to remain at the facility, away from others, as opposed to leaving.[35]

The fourth *Atlantic Steel* factor is whether the misconduct was provoked by the employer's unfair labor practices. This does not require that the employer's conduct be explicitly alleged as an unfair labor practice, but rather includes conduct evincing intent to interfere with protected rights. *Postal Service*, supra, citing *Network Dynamics Cabling, Inc.*, 351 NLRB 1423, 1429 (2007), and *Overnite Transportation Co.*, 343 NLRB 1431, 1438 (2004). In this case, during the May 25 meeting, Ackerson and McGuire both harassed Cannon-El in response to him raising collective concerns. It was, in part, this harassment that led Cannon-El, Poff, and Bauer to go to human resources the following day to file their complaints. Then, after Cannon-

[34] In *Mast Advertising & Publishing, Inc.* 304 NLRB 819, 826 (1991), an employee attending a meeting in human resources with another co-worker was asked to leave after she made repeated interruptions and profane outbursts. She refused twice but eventually complied three-to-five minutes later. After she left the room, she engaged in a conversation in the hallway near where the meeting was taking place. Her subsequent suspension was, in part, because of her refusal to leave. The Board found she was engaged in protected, concerted activity and did not lose the protection of the Act by her statements or conduct.

[35] The fact that Cannon-El also wanted proof that Respondent contacted the police to escort him out because he attempted to file a complaint does not, in my opinion, negate his other reasons for staying.

El continued to persist in asserting the basis for his complaint, Adams demanded that he leave and threatened to call the police if he did not do so, which I already have found provoked the conduct at issue. Based on this evidence, I find the fourth factor favors protection.

In summary, I conclude that all four *Atlantic Steel* factors, individually and in the aggregate, favor Cannon-El's protection under the Act.[36] Accordingly, I conclude that the Respondent violated Section 8(a)(1) of the Act by contacting the police to remove him from the premises on May 26, indefinitely suspending him on around May 26, and terminating him on June 10.[37]

CONCLUSIONS OF LAW

1. The Respondent, Meyer Tool, Inc., is an employer engaged in commerce out of its Cincinnati, Ohio facility within the meaning of Section 2(2), (6), and (7) of the Act.

2. By the following conduct, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act that affect commerce within the meaning of Section 2(6) and (7) of the Act:

(a) Summoned the police to remove William Cannon-El, III, from it premises.

(b) Suspended indefinitely William Cannon-El, III.

(c) Terminated William Cannon-El, III.

REMEDY

Having found that the Respondent violated Section 8(a)(1) of the Act by summoning the police to remove, indefinitely suspending, and later discharging William Cannon-El, III, because he engaged in protected, concerted activities, I recommend an order requiring that Respondent offer him full reinstatement to his former job or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously

[36] Even if I found the third factor did not favor protection, Cannon-El would still retain the protection of the Act under the *Atlantic Steel* test because the other three factors strongly favor protection. See *Postal Service*, 360 NLRB 677 fn. 2 (2014) (citing to *Kiewit Power Constructors Co. v. NLRB*, 652 F.3d 22, 27 fn. 1 (D.C. Cir. 2011) ("It is possible for an employee to have an outburst weigh against him yet still retain protection because the other three factors weigh heavily in his favor.")).

[37] Although the *Wright Line* does not apply in this case, I find that the result would be the same if it did. As previously stated, Cannon-El was engaged in protected, concerted activity on May 25 and 26; Respondent was aware of that activity; and Adams statements on May 26, including her seemingly dismissive responses, her ordering him to leave, and her threatens to call the police when he continued his protected, concerted activity, is evidence of animus. Respondent has failed to prove that it would have taken the same action in the absence of the Cannon-El's protected activity, because there is no evidence that Respondent treated another employee similarly. There is no evidence that an employee was suspended or discharged for a single occurrence of allegedly threatening or insubordinate behavior. Each of the examples in the record involved repeated acts of harassment, threats, or insubordination--and in some of those instances, the employee was not discharged. (R. Exh. 4). If anything, these examples show Respondent treated Cannon-El differently than it treated other employees, and evidence of disparate treatment supports a finding of animus. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1186 (2011). This is particularly true where there is no evidence of *any* prior discipline to Cannon-El.

enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with the recent decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), Respondent shall compensate Cannon-El for his search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. Additionally, Respondent shall be required to compensate William Cannon-El, III, for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).[38] Finally, Respondent shall be ordered to remove from its files any reference to contacting the police, indefinitely suspending, and discharging William Cannon-El, III, and to notify him in writing that this has been done and that none of these adverse actions will be used against him in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[39]

ORDER

Respondent, Meyer Tool, Inc. at its Cincinnati, Ohio facility, its officers, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Summoning the police to remove, indefinitely suspending, discharging, or otherwise discriminating against employees because they engage in protected, concerted activity.

(b) In any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order,[40] offer William Cannon-El, III, reinstatement to his former job, remove from its files all references to summoning the police to

[38] The General Counsel argues Cannon-El is entitled to consequential damages. I cannot order Respondent to pay consequential damages for costs Cannon-El may have incurred as a result of Respondent's unfair labor practices. As the Board has recognized, it would require a change in Board law for me to award consequential damages. See, e.g., *Guy Brewer 43 Inc.*, 363 NLRB No. 173, slip op. at 2 fn. 2 (2016). Since I must follow existing Board law, and current law does not authorize me to award consequential damages, the General Counsel must direct its request to the Board.

[39] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

remove, indefinitely suspending, and/or discharging William Cannon-El, III, and notify him in writing that this has been done, and that none of these adverse actions will be used against him in any way. Make William Cannon-El, III, whole for any loss of earnings and other benefits resulting from his unlawful suspension and discharge, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

(b) Within 14 days after service by the Region, post at its facilities in Cincinnati, Ohio copies of the attached notice marked Appendix A. Copies of the notice, on forms provided by the Regional Director for Region 9 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places throughout its Cincinnati, Ohio facility, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has closed certain facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 25, 2016.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

DATED, WASHINGTON, D.C., JUNE 12, 2017.

ANDREW S. GOLLIN
ADMINISTRATIVE LAW JUDGE

[40] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT
FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT summon the police to remove, suspend, discharge, or otherwise discriminate against you because you engage protected, concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL offer William Cannon-El, III, full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make William Cannon-El, III, whole for any loss of earnings and other benefits resulting from his unlawful suspension and discharge, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate William Cannon-El, III, for the adverse tax consequences, if any, of receiving a lump sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL remove from our files any reference to our unlawful summoning of the police, suspension, and discharge of William Cannon-El, III, and we will notify him in writing that this has been done and that the contacting of the police, suspension, and discharge will not be used against him in any way. WE WILL NOT do anything to prevent you from exercising the above rights.

MEYER TOOL
(Employer)

DATED: _____ BY_____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under

the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

John Weld Peck Federal Building, 550 Main Street, Room 3003, Cincinnati, OH 45202-3271
(513) 684-3686, Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/09–CA–185410 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (513) 684-3733.